In the

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-554

PHILIPPINE ACE LINES,

Petitioner

vs.

SEATTLE STEVEDORE COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respectfully submitted,

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PRATT PRINTING COMPANY — SEATTLE, WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 29, 1973 as to which rehearing was denied on June 29, 1973.

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed herein as Appendix A. Order denying rehearing and modifying opinion is printed herein as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered May 29, 1973 (Appendix A). A timely petition for rehearing was filed June 12, 1973 and was denied June 29, 1973 (Appendix B).

Notice of action by the Circuit Court in denying Petition for Rehearing was given by mail making applicable Federal Rules of Appellate Procedure Rule 26(c). This Petition for Writ of Certiorari is filed less than ninety days after the denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1)

QUESTIONS PRESENTED

1. Upon the facts as found by the Trial Court did not the Circuit Court err in not holding that Philippine Ace Lines was entitled to full indemnity?

2. Alternatively, did not the Court of Appeals err in not remanding the case to the District Court with instructions for the District Court to make and enter findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

This is an action brought by Petitioner seeking full indemnity from Respondent in the sum of $75,000.00 paid by it to longshoreman Jack Turner arising out of a personal injury suffered by that longshoreman aboard Petitioner's vessel TINDALO in Seattle on October 27, 1967 together with sums expended for attorney's fees and disbursements in defense of the personal injury action. It is agreed that the settlement was reasonable for the injury sustained and that the fees and expenses incurred were reasonable for the services rendered. Petitioner's action was predicated upon a breach of warranty of workmanlike service owed by Respondent to Petitioner. Respondent's only defenses as set forth in its contentions as contained in the Pretrial Order were:

> "1. The plaintiff's payment to Jack H. Turner was voluntary and without the primary obligation of plaintiff to Jack H. Turner being established.
>
> 2. Plaintiff was not subject to liability to Jack H. Turner.
>
> 3. The plaintiff failed to give adequate and timely action and tender of the defense thereof." (R. 19-20)

Respondent made no other defenses to Petitioner's cause of action. Nowhere is it contended that there was any conduct on the part of Petitioner to preclude indemnity. At the conclusion of Petitioner's case, Petitioner moved pursuant to FRCP 41(b) for dismissal. The trial Court granted this motion.

Respondent by moving under Rule FRCP 41(b) asked the Court to dismiss "on the ground that upon

the facts and the law, the plaintiff has shown no right to relief." This, of necessity, involves applying facts to the law. In this case the facts are undisputed. The Court is required, once the motion is granted, to prepare findings and conclusions as provided by FRCP 52(a). In this case, the Court's only meaningful action as required by these rules was in its Finding of Fact 14:

> "That plaintiff failed to prove by a preponderance of the evidence that defendant breached its warranty of workmanlike service in conducting the stevedore operations aboard the SS TINDALO on October 27, 1967." (R. 66)

The Court made no conclusion of law denoted as such in that regard. Finding 14 must, therefore, be considered both as a finding of fact and conclusion of law.

The Court of Appeals by its memorandum decision (Appendix A) affirmed the decision of lower court and denied indemnity.

REASONS FOR GRANTING THE WRIT

1. Decision of the Court of Appeals is inconsistent with and contrary to prior decisions of this Court.

The District Court found by undisputed evidence:

(1) That the cargo in question was in disarray (R.63);

(2) This condition was known to defendant prior to the discharge of cargo (R.65);

(3) The defendant had contracted to perform all required stevedore services in the discharge of cargo (R.64);

(4) That Turner was injured when struck by pipe being discharged (R.65-66).

Against these facts are to be applied the so-called *Ryan* doctrine of the stevedore's warranty of workmanlike service.

The warranty of workmanlike service owed by Respondent to Petitioner is set forth in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.* where the Court stated:

> "The shipowner here holds petitioner's uncontroverted agreeemnt to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a non contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's actior. is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 US 124, 100 L.Ed 133, 141, 142, 76 S.Ct. 232.

The Supreme Court equates this warranty to the manufacturer's guarantee of the soundness of its manufactured product. Norris in his treatise *The Law of Seamen* devotes a section to Products Liability causes because of its importance. Elements necessary to effect recovery in such cases according to Norris are:

"(a) Product is capable of causing injury;

(b) Defendant is identifed with the product in question;

(c) The injury was proximately caused by the product." 2 Norris, *The Law of Seamen*, Section 715, P. 457.

Translating those requirements to this case, it is apparent from the admitted facts and the findings that:

(a) The product (stevedore service) is capable of causing injury (R. 65-66);

(b) Defendant stevedore contractor was identified with the product (stevedore service) (R. 64) in that defendant was performing the discharge operation;

(c) Injury was proximately caused by the product (stevedore service) (R. 65-66) in that longshoreman Turner was injured when struck by pipe being discharged by defendant.

On such showing alone, there is a breach of warranty within the holding of *Ryan*. This breach of warranty is entirely independent of any theory of negligence.

Ryan is followed by the Supreme Court's decision in *Weyerhaeuser S.S. Co. v. Nacirema Co.*, wherein the Court stated:

> "We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in Ryan, but also to the use of equipment, incidental thereto, such as the winch shelter involved here. American President Lines, Ltd. v. Marine Terminals Corp. (CA 9 Cal) 234 F2d 753, 758; United States v. Arrow Stevedoring Co. (CA9 Cal) 175 F2d 329, 331. If in that regard respondent rendered a substandard performance which led to foreseeable liability of

petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery." *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 2 L.Ed. 2d 491, 494, 78 S.Ct. 438

From these two cases, it is abundantly clear that even though the condition of the No. 2 hold constituted an unseaworthy condition, this fact does not preclude indemnity where the stevedore contractor with knowledge of the condition performed work in the hold and, in fact, undertook movement of the cargo from the hold. By its discharge methods, the stevedore contractor "brought into play the unseaworthy condition of the vessel." This principle was enunciated in *Crumady* by the Supreme Court stating:

> "We think this case is governed by the principle announced in the Ryan case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the Ryan case, 'competency and safety of stowage are inescapable elements of the services undertaken.' 350 U.S. at 133. They are part of the stevedore's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' Id 350 US at 133, 134. See MacPherson v. Buick Motor Co. 217 NY 382, 111 NE 1050, LRA 1916F 696, Ann Cas 1916 C 440, 13 NCCA 1029.
>
> We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of

the warranty of workmanlike service, the vessel may recover over.

The judgment of the Court of Appeals is reversed and the judgment of the District Court is reinstated.

It is so ordered." *Crumady v. JOACHIM HENDRIK FISSER,* 358 US 423, 79 S.Ct. 445, 3 L.Ed. 2d 413, 417, 418

To similar effect is the Supreme Court's *Waterman SS Corp. v. Dugan & McNamara* decision wherein it is stated:

"In Ryan Stevedoring Co. v. Pan-Atlantic Corp. 350 US 124, 100 L.Ed. 133, 76 S.Ct. 232, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling, as in Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 US 563, 2 L.Ed. 2d 491, 78 S.Ct. 438. The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. JOACHIM HENDRICK FISSER, 358 U.S. 423, 429, 3 L.Ed. 2d 413, 418, 79 S.Ct. 445. The factual allegations of the third-party complaint in the present case comprehend the latter situation." *Waterman S.S. Corp. v. Dugan &McNamara,* 364 U.S. 421, 5 L.Ed. 2d 169, 171, 81 S.Ct. 200

Crumady speaks in terms of negligence but subsequent decisions of the Supreme Court have made it most emphatically clear that negligence is not a pre-

requisite to a finding of breach of the warranty of Workmanlike Service.

In *Italia v. Oregon Sevedoring Co.*, the Court held:

> "Although in Ryan the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and non-negligent conduct alike." *Italia v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.Ed. 2d 732, 738

2. The decision of the Ninth Circuit conflicts with the decision of the Fifth Circuit in *Guidry v. Texaco, Inc., et al,* 430 P.2d 781 (1970).

Under somewhat camparable facts, the Fifth Circuit upheld indemnity:

> "* * * [T]hat Texaco's own conduct precludes recovery. Gulf Copper's position is based on the dictum in Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., supra, to the effect that a shipowner may recover indemnity against a stevedore company for breach of the warranty of workman like performance 'absent conduct on its [the shipowner's] part sufficient to preclude recovery.' See also Waterman S.S. Corp. v. David, 353 F.2d 660 (5th Cir.), cert. denied 384 U.S. 972, 86 S.Ct. 1863, 16 L.Ed.2d 683 (1966). There is no question here that Guidry and Balsano were asked to work in a dangerous position to do a dangerous job. But this does not constitute conduct on the part of Texaco sufficient to preclude recovery of indemnity against Gulf Copper. Admittedly the place, method, tools and personnel furnished to remove the pipe were not reasonably fit for the job, but Texaco had every right to look to Gulf Copper to know that they were proper and if not to take steps

to see that they were made reasonably fit. The district court found that the only place to work was the catwalk, but such being the case Gulf Copper should have taken steps to make the catwalk a reasonably fit place to work. Since Gulf Copper did not do so, the ultimate responsibility must rest upon its shoulders under Ryan, supra. To the same effect is our holding in Grigsby v. Coastal Marine Service, supra, wherein we said:

> 'The tank entry was done with the full knowledge of Coastal's representatives. Indeed, it was done to effectuate Coastal's work —the discharge by portable pump of the water accumulated in the wing tank. Obviously the tank was not safe for men at that time, either actually or under applicable safety regulations (* * *). Even though the tank was not meant to be safe for persons, once it became necessary to enter it, the service contractor had the obligation not to perform its work in a way which would make the vessel unseaworthy, i.e., unfit for man. * * * It was not reasonably fit for the presence of men because the contractor had failed and continued to fail to take those steps which were required to make it reasonably safe—i.e., test, ventilate or equip workers with the safety appliances needed (* * *).'
>
> 'To this extent, it was the action of the contractor which created the unseaworthy condition.' 412 F.2d at 1031-1032.

We therefore affirm on the issue of indemnity." *Guidry v. Texaco, Inc., et al*, 430 F.2d 781 at 785 (CA 5-1970)

3. The District Court did not perform its duty under FRCP 52(a) in that the District Court failed to "find the facts specially and state separately its conclusions of law thereon".

After expressing its concern as to the sufficiency of the Trial Court Findings, the Ninth Circuit affirmed the District Court without remanding for further findings. This was done notwithstanding the failure of the trial court to comply with Rule 52(a) of Federal Rules of Civil Procedure. In these circumstances, the decision of the Second Circuit in *Matton Oil Transfer Corporation v. THE DYNAMIC, et al,* 123 F.2d 999 is particularly appropriate. The court there stated:

> "Consequently we do not feel we can properly dispose of this case without the help which observance of the rule would afford us. Moreover, the insistence of the Supreme Court upon appropriate findings should not be disregarded. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S.Ct. 517, 84 L.Ed. 774, and cases cited; Interstate Circuit, Inc. v United States, 304 U.S. 55, 58 S.Ct. 768, 82 L.Ed. 1146; cf. Smith v. Lykes Brothers-Ripley S.S. Co., 5 Cir., 105 F.2d 604, certiorari denied 308 U.S. 604, 60 S.Ct. 141, 84 L.Ed. 505; The Plow City, 3 Cir., 122 F.2d 816, 819." *Matton Oil Transfer Corporation v. THE DYNAMIC, et al,* 123 F.2d 999, 1,000, 1001

We likewise believe the nature and purpose of findings and the duty of the trial Judge to make them is well stated by Judge Frank in *United States v. Forness*:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important

purpose—that of evoking care on the part of the trial judge in ascertaining the facts.[13] For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government[14] precisely because on it rests the responsibility of ascertaining the facts.[15] When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."[16]

Purpose, Nature of Findings, Moore's Federal Practice 5A, page 2708

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 29 1973

DENNIS R. MATHEWS, CLERK
U. S. COURT OF APPEALS

PHILIPPINE ACE LINES,

Plaintiff-Appellant,

-vs-

No. 71-1289

SEATTLE STEVEDORE COMPANY, a corporation,

Defendant-Appellee.

PHILIPPINE ACE LINES,

Plaintiff-Appellee,

-vs-

No. 71-1506

SEATTLE STEVEDORE COMPANY, a corporation,

Defendant-Appellant.

Appeal From the United States District Court
For the Western District of Washington

Before: HUFSTEDLER and WALLACE, Circuit Judges, and HILL*, District Judge

MEMORANDUM

A Philippine Ace Lines vessel was improperly loaded with a cargo of steel pipe in Japan. On her trip to Seattle, rough seas aggravated the problem, and the cargo was in some disarray when the hatches were opened there. While off-loading the pipes from one of the holds, a longshoreman was injured. He sued for damages and Philippine ultimately settled. Philippine then brought an indemnity action against Seattle Stevedore Company, the employer of the longshoreman. At the conclusion of Philippine's case in chief, tried to the court,_/

*Honorable Irving Hill, United States District Judge, Los Angeles, California, sitting by designation.

FPI-Sandstone
5-10-71-2M-600

Seattle moved for an involuntary dismissal pursuant to Fed.R.Civ.P. 41(b). The district court entered judgment for Philippine for the cost of its defense of the longshoreman's action and for Seattle for the amount of its compensation claim withheld by Philippine from the amount due under the settlement to the longshoreman. The court denied Philippine's indemnity claim. Cross-appeals followed and we affirm in part.

The district court found that Philippine "failed to prove by preponderance of the evidence that [Seattle] breached its warranty of workmanlike service...." The question of "whether the stevedore in workmanlike fashion attacked the problem presented by the known unseaworthy condition...cannot be answered as matter of law...." but is rather a question of fact. Judith Ann Liberian Transport Corp. v. Crawford, 399 F.2d 924, 926 (9th Cir. 1968). Philippine properly points out that there are many ways for a stevedore to breach its warranty of workmanlike performance: the injury may be a result of the individual longshoreman's negligence; the stevedore may be negligent in its discharging plan, its supervision or through the negligence of other longshoremen, its employees. We would prefer to know the basis for the trial court's finding that Philippine failed in its burden of proof. We have noted that the "better practice decrees that cases tried to a judge should be resolved by findings that embrace the preliminary, as well as the ultimate, issues." Townsend v. Benavente, 339 F.2d 421, 422 (9th Cir. 1964). However, in this case, Philippine did not ask for more specific findings and we must therefore assume that the district court found against Philippine on every proposed theory of breach of Seattle's warranty of workmanlike service. See Switzer Bros., Inc. v. Locklin,

297 F.2d 39, 45 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962); Burkhard v. Burkhard, 175 F.2d 593, 596 (10th Cir. 1949). Because we cannot say that the findings of the trial court were clearly erroneous, we must affirm on this point.

Counsel for Philippine properly confesses error in that part of the judgment of the district court which granted attorneys' fees to Philippine for its defense of the action brought by the injured longshoreman. The part of the judgment awarding fees is vacated.

AFFIRMED in part.

B-1

FILED
JUN 29 1973
DENNIS P. MATHEWS, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIPPINE ACE LINES, Plaintiff-Appellant, -vs- SEATTLE STEVEDORE COMPANY, a corporation, Defendant-Appellee.	No. 71-1289 ORDER
PHILIPPINE ACE LINES, Plaintiff-Appellee, -vs- SEATTLE STEVEDORE COMPANY, a corporation, Defendant-Appellant.	No. 71-1506

Before: HUFSTEDLER and WALLACE, Circuit Judges, and HILL*, District Judge

Plaintiff-appellant's Petition for Rehearing is denied.

*Honorable Irving Hill, United States District Judge, Los Angeles, California, sitting by designation.